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The International Law Commission and the Development of International Investment Law

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Abstract

International investment law has received increasing attention due to the proliferation of investment treaties and the number of arbitral awards made thereunder. At the end of 2011, there were 450 known investment cases that have been settled or are pending. Yet, there are many core questions that remain to be authoritatively answered. Although they are faced with similar problems, arbitral tribunals often adopt diverging solutions to investment disputes. This paper considers the nature of the divergences in investment treaty jurisprudence and the role that could potentially be played by the International Law Commission (ILC) in contributing to the coherent development of international investment law. The paper argues that some areas of international investment law are more appropriate for attention by the ILC than others. It draws a distinction between those aspects of international investment that only have a basis in treaty law and those aspects of international investment law that are underpinned by common standards stemming from customary international law or general principles of law. The paper argues that we cannot necessarily expect the convergence of jurisprudence in the context of treaty provisions that have been specifically negotiated by the parties, as these provisions must be interpreted on a case-by-case basis. This means that topics like the MFN clause are less suitable for codification, as the meaning of these provisions will often depend on the particular context of the treaty and the precise intentions of the parties. In contrast, there is a stronger case for the codification of international investment law where common standards exist. The paper therefore considers the formation and development of customary international law in relation to investment protection. It argues that whilst investment treaty tribunals have struggled with the identification of customary international law in this area, the ILC could play a central role in clarifying the state of the relevant rules and principles, in furtherance of its core mandate of promoting the progressive development and codification of international law.

Keywords

International Investment Law; International Law Commission; Fragmentation of International Law; Most-Favoured-Nation Treatment; Codification; Customary International Law.

THE INTERNATIONAL LAW COMMISSION AND THE DEVELOPMENT OF INTERNATIONAL INVESTMENT LAW

Working Paper

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1. Introduction

International investment law is a fast-moving and dynamic area of law. The subject has assumed an increasing prominence over the past twenty years largely due to the proliferation of investment treaties and the number of arbitral awards made thereunder. At the end of 2011, there were 450 known cases that had been brought under bilateral investment treaties or similar agreements.¹ At the same time, international investment law is a subject that is still at a relatively early stage of development and there are many core questions that remain to be authoritatively answered.

Although they deal with similar issues, arbitral tribunals often adopt diverging solutions to investment disputes. Some authors have even talked about a “legitimacy crisis” in international investment law.² On this basis, various suggestions have been put forward about how to promote coherence in the development of international investment law. Indeed, recently, the International Law Commission (ILC) has joined the variety of institutions and individuals expressly an interest in how to tackle this challenge. It has already taken up the issue of Most-Favoured Nation (MFN) clauses on its agenda, and, in particular, how these provisions have been interpreted by investment treaty tribunals.

The central argument of this paper is that the ILC can make a valuable contribution to the development and consolidation of international investment law. At the same time, it is suggested that the Commission should choose its focus of study carefully. In particular, it is argued that the ILC should concentrate on its core mandate of codifying customary international law. Not only is this an area that is ripe for codification in the field of investment protection, but the ILC is also in a prime position to contribute to this task. In contrast, those issues of international investment law which depend upon the particular wording of individual treaties, such as MFN clauses, should be left to tribunals to develop based upon existing rules of treaty interpretation.

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¹ United Nations Conference on Trade and Development, ‘Latest Developments in Investor-State Dispute Settlement’, *IIA Issue Note No. 1*, April 2012, at 1; available at www.unctad.org/diae <last accessed 9 October 2012>.

² See e.g. S. Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’ (2005) 73 *Fordham L. Rev.* 1521; A. Afilalo, ‘Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis’ (2004) 17 *Georgetown Int’l Envr. L. Rev.* 51; contrast D. Krishan, ‘Thinking about BITs and BIT Arbitration: The Legitimacy Crisis that Never was’, in T. Weiler and F. Baetens (eds), *New Directions in International Economic Law: In Memoriam Thomas Waelde* (Martinus Nijhoff Publishers, 2011) 107.

2. The Mandate and Function of the International Law Commission

Before we can assess the role of the ILC in relation to international investment law, it is necessary to understand a little about the nature of the Commission itself. The ILC was established in 1948 as a body of independent experts to assist the UN General Assembly in its task of “encouraging the progressive development of international law and its codification.”³ Thus, the Commission has two related but arguably distinct tasks. Codification is understood as “the more precise formulation and systematization of rules of international law in fields where there already has been extensive State Practice, precedent or doctrine”, whereas progressive development refers to “the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States.”⁴ In practice, the ILC has struggled to clearly distinguish between these two activities⁵ and it has nevertheless been recognized since the early attempts of codification by the League of Nations that the process of codification “should not confine itself to the mere registration of the existing rules, but should aim at adapting them as far as possible to the contemporary conditions of international life.”⁶

Despite these procedural ambiguities, the ILC has to date played an important role in developing various aspects of international law. The ILC is perhaps best known for its preparation of draft articles on the law of treaties⁷ and the law of state responsibility.⁸ However, the ILC has also contributed to the development of the several substantive areas of international law, such as the international law of the sea, international environmental law, and international criminal law.⁹

The work of the Commission has been highly influential on states and on international courts and tribunals. Sometimes, the recommendations of the Commission lead to the negotiation and conclusion of a treaty, as in the case of the law of treaties. In these cases, the results are binding upon those states which choose to consent to be bound by the instrument. Yet, often, the work of the ILC can also have a declaratory effect on international law, even if it is not formally accepted in a treaty. Thus, many provisions of the 1969 Vienna Convention on the Law of Treaties are considered to be declaratory of customary international law and therefore binding on all states, whether or not they have become a party to the treaty.¹⁰ Moreover, even when they are not adopted in treaty form, texts prepared by the Commission have been

³ UN Charter, Article 13.

⁴ ILC Statute, Article 15.

⁵ I. Sinclair, *The International Law Commission* (Grotius Publications, 1987), 46.

⁶ Resolution adopted by the League of Nations on 27 September 1927, available in (1947) 41 *Am. J. Int'l L.* 105.

⁷ The Commission produced a set of draft articles on the law of treaties in 1966. These draft articles formed the basis of the Vienna Convention on the Law of Treaties adopted in 1969.

⁸ The Commission adopted a set of draft articles on the law of state responsibility in 2001. The UN General Assembly took note of the draft articles and commended them to the attention of governments in resolution 59/35 of 12 December 2001. See also resolution 59/35 of 2 December 2004.

⁹ For a general overview of the work of the Commission, see International Law Commission, *The Work of the International Law Commission*, 8th edn (United Nations Publications, 2012).

¹⁰ See e.g. *Case concerning the Gabčíkovo-Nagymaros Project* (1997) ICJ Reports 7, para. 46: “The Court has no need to dwell upon the question of the applicability in the present case of the Vienna Convention of 1969 on the Law of Treaties. It needs only to be mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention might be considered as a codification of existing customary law.”

taken by courts and tribunals to be a definitive statement of customary international law.¹¹ The question addressed in this paper is whether there is a role for the Commission in promoting the progressive development and codification of international investment law. It is therefore necessary to ask whether this is an area of international law that is ripe for codification? It will also be asked whether all aspects of international investment law can be subject to the same processes of codification and progressive development?

3. Historical Perspectives on the Codification of International Investment Law

The protection of foreign investors has been addressed by international law for over a century. There are many examples of international arbitral awards in the early twentieth century that were concerned with the protection of foreigners from the arbitrary treatment of host governments.¹² Indeed, in 1924, a Committee of Experts constituted by the League of Nations to investigate which topics or fields of law were “sufficiently ripe” for codification included the law relating to the protection of aliens in their recommendations.¹³ Yet, the Hague Codification Conference of 1930 was unable to agree on rules reflecting the current state of international law in this area and there were no clear outcomes of this codification attempt.

Eighteen years later when the ILC was established, the question of which topics of international law were ripe for codification was once again on the table. Charged with preparing a report on the codification of international law, Hersch Lauterpacht concluded that the treatment of aliens was a topic that deserved the attention of the newly created UN body. Lauterpacht argued that “the reasons which have been adduced in the previous section as militating in favour of a renewed effort at codifying the law of nationality and of conflicts of nationality—the growing movement across frontiers in an age in which barriers of distances have dwindled and the enhanced status of the individual as the subject of fundamental rights and freedoms—apply even more cogently to the question of the treatment and the legal position of aliens”¹⁴ and he noted the “substantial body of State practice which, however, is only imperfectly related to principle.”¹⁵ Thus, he saw an opportunity to clarify the rules and principles that applied to the protection of aliens, including foreign investors.

Following this recommendation, the law of state responsibility, including responsibility for the mistreatment of aliens, was given early priority by the ILC.¹⁶ Yet, the ILC ran into similar problems that had existed during the previous attempt at codification. Some members of the Commission greeted the draft articles prepared by García-Amador as Special Rapporteur on the law of state responsibility with skepticism, and sometimes hostility. As

¹¹ For example, in *CMS Gas v Argentina*, the arbitral tribunal accepted that Article 25 of the ILC Articles on State Responsibility “adequately reflects the state of customary international law on the question of necessity”; *CMS Gas v Argentina*, Case No. ARB/01/8, Award of 12 May 2005, at para. 315.

¹² One of the most commonly cited cases from this period is the so-called Neer claim; *L.F.H. Neer and Pauline Neer (U.S.A.) v. United Mexican States* (15 October 1926), Reports of International Arbitral Awards, vol. IV, 60-66.

¹³ See Resolution adopted by the Assembly of the League of Nations on 27 September 1927 deciding to refer inter alia the topic of “Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners” to an international conference on codification; available in S. Rosenne, *League of Nations Conference for the Codification of International Law 1930*, vol. 1 (Oceana Publications, 1975), ix.

¹⁴ International Law Commission, *Survey of International Law in Relation to the Work of Codification of the International Law Commission*, UN Document A/CN.4/1/Rev.1, para. 79.

¹⁵ International Law Commission, *Survey of International Law in Relation to the Work of Codification of the International Law Commission*, para. 79.

¹⁶ See e.g. UN General Assembly resolution 799(VIII) of 7 December 1953.

noted by Crawford and Grant, “the decade of decolonization could hardly have been a worse time to attempt a statement of what many governments (Latin American but increasingly Asian and African governments also) perceived as the law of economic development by capital-exporting countries.”¹⁷ Indeed, reports prepared by the Special Rapporteur were criticized within the Commission for viewing state responsibility from the perspective of capitalist countries. In particular, one contributor to the ILC debates referred to “a distinct cleavage between the views held on the subject of the law of claims in the United States of America, on the one hand, and in the Latin American republic on the other.”¹⁸ It was clear that this was an area where deep political and ideological splits would prevent the codification of international law, despite the existence of a number of previous cases where arbitral tribunals and courts had applied standards of customary international law. The plan to codify substantive rules of state conduct with regard to aliens was therefore dropped by the ILC which instead turned its attention to identifying the secondary rules of state responsibility.¹⁹

It is the same hostility towards the codification of rules on the protection of aliens that led many capital-exporting states to conclude investment treaties as a means of protecting their nationals investing abroad. Germany started this trend in 1959 when it concluded its first Bilateral Investment Treaty (BIT) with Pakistan, and it was soon followed by many other states.²⁰ Today there are over 2500 BITs, as well as a growing number of regional economic instruments containing a chapter dedicated to the protection of investors and investments. Although no two of these treaties are identical in their content, there is a surprising similarity in the format and structure of these various treaties. Most of them contain similar standards of investment protection, as well as procedures for investor-state dispute settlement that allow individuals or companies negatively affected by the actions of a state to bring a claim directly to an arbitral tribunal.

The rapidly growing body of arbitral decisions is leading to what some call a global investment regime.²¹ There is a strong tendency amongst investment tribunals to interpret similar wording in different treaties in the same manner. There is a trend for arbitrators to cite other decisions, even decisions made under other distinct treaties, on the rationale that “it is a fundamental principle of the rule of law that ‘like cases should be decided alike’, unless a strong reason exists to distinguish the current case from a previous one.”²² Supporting this trend, Schill argues that “notwithstanding ... differences, investment treaties conform to

¹⁷ J. Crawford and T. Grant, ‘Responsibility of States for Injuries to Foreigners’, in J. P. Grant and J. Craig Barker (eds), *Harvard Research in Law Contemporary Analysis and Appraisal* (Fred B Rothman & Co, 2007), 89.

¹⁸ Comments of Gomex Robledo, 566th meeting of the ILC (1960 I) *Ybk Int’l L. Comm.* 264, para. 11. He noted three particular areas of disagreement: the position of aliens, the waiver of diplomatic protection (Calvo Clause), and the denial of justice.

¹⁹ See generally J. Crawford, *The International Law Commission’s Articles on State Responsibility* (Cambridge University Press, 2002), 1-2.

²⁰ The Belgium/Luxembourg Economic Union concluded its first BIT with Tunisia in 1964. France concluded its first BIT in the early 1970s, whereas the UK started its BIT programme in 1975. With its first BIT concluded with Egypt in 1982, the United States was relatively late in concluding investment treaties compared to European nations, although it already had a longstanding system of friendship, commerce, and navigation treaties which played a similar role. See K.J. Vandeveld, ‘The Bilateral Investment Treaty Program of the United States’ (1988) 21 *Cornell Int’l L. J.* 201.

²¹ J. Salacuse, ‘The Emerging Global Regime for Investment’ (2010) 51 *Harv. J. Int’l L.* 427, at 431.

²² *Daimler Financial Services AG v Argentine Republic*, ICSID Case No. ARB/05/1, Award of 22 August 2012, at para. 52; see also *Suez and others v Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability of 30 July 2010, at para. 189.

archetypes and converge considerably with regard to the principles of investment protection which they establish”²³ and he continues to assert that “these principles are more or less identical across the myriad of BITs [so that] divergences in treaty texts are arguably limited enough so as to allow the conclusion that one can observe the existence of relatively uniform treaty texts that form the basis of any international investment treaty.”²⁴

The search for a single meaning to be attributed to common standards, such as fair and equitable treatment or full protection and security, has led to mixed results. Despite the desire to “contribute to the harmonious development of investment law”²⁵, clear divergences have emerged in the case law about whether common standards exist, and if they do, on the content of such standards. Indeed, the central question that underpins many of the contemporary investment cases is arguably the extent to which we can claim the existence of general principles that underpin the multitude of bilateral investment treaties, rather than standards based upon the particular intentions of the parties to the treaty.²⁶

It is a basic premise of this paper that one cannot assume that universal standards exist simply because similar language is found in various investment agreements. After all, as noted by one study on the investment regime:

“[investment treaties] are the product of negotiations between two sovereign States, and the exact scope and content of [investment treaties] vary considerably – even among those signed by a single country. The variances reflect the States’ different investment approaches and respective bargaining positions. It is therefore necessary, in the event of an investment dispute, to study the exact terms of any applicable bilateral investment treaties with great care.”²⁷

It follows that the quest for multilateralism of investment standards can only be truly justified if it is based upon universal rules or principles that can be shown to be generally accepted by states. Indeed, in his more recent work on multilateralism in investment law, Schill has acknowledged that “the move ... to create a multilateral legal order for international investment relations will only be legitimate and accepted by States if it remains linked to one of the traditional sources of multilateral order under international law.”²⁸ It follows that there is a need to identify whether there is a rule of customary international law or a general principle of law before one can talk about a universal rule or principle that applies to all states. This basic consideration must inform the debates about the emergence of a jurisprudence constante in international investment law. It can also help us to assess the potential role that the ILC can play in the development of international investment law.

²³ S. W. Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, 2009), 65.

²⁴ Schill, *The Multilateralization of International Investment Law*, 69.

²⁵ *Saipem S.p.A v The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award of 30 June 2009, at para. 67.

²⁶ See e.g. C. McLachlan, ‘Investment Treaties and General International Law’ (2008) 57 *Int'l & Comp. L. Q.* 361, 383.

²⁷ L. Reed, J. Paulsson and N. Blackaby, *Guide to ICSID Arbitration* (Kluwer Law International, 2004), 40.

²⁸ See S. W. Schill, ‘From Sources to Discourse: Investment Treaty Jurisprudence as the New Custom?’, paper presented at 16th Investment Treaty Forum Public Conference on “Is There an Evolving Customary International Law on Investment?”, British Institute of International and Comparative Law, London, 6 May 2011, at 16.

4. *The International Law Commission and the MFN Clause*

It was in response to the doctrinal confusion at the heart of international investment law that the ILC took up the topic of MFN treatment in 2009.²⁹ The ILC had already dealt with MFN clauses in the 1970s culminating in the adoption of draft articles on the topic in 1978.³⁰ Yet, the draft articles had been greeted with some caution by states and the General Assembly did not follow the recommendation of the Commission to conclude a convention on the topic.³¹ Rather, it ultimately decided to simply bring the draft articles to the attention of states and relevant intergovernmental organizations for their consideration in such cases “as they consider appropriate.”³²

The impetus to revisit the topic came from the increasing relevance of MFN to many legal issues, particularly in the field of international economic law. Thus, the ILC noted in its 2008 report that “MFN has been given a new lease of life with the inclusion of regional trade agreements and the explosion in the conclusion of bilateral investment agreements, all usually including some form of MFN requirement.”³³ As a result, “there is now a substantial new body of practice to be taken into account in assessing how MFN clauses are being used and how they operate in practice.”³⁴

Although the topic is once again of the agenda of the Commission, the precise aim of the current work remains somewhat obscure. It seems that the ILC does not propose to revise the draft articles previously adopted in 1978.³⁵ Indeed, the Study Group appears to confirm the core principles at the heart of the 1978 articles in its discussions.³⁶ Rather, “the overall objective of the Study Group is to seek to safeguard against fragmentation of international law and to stress the importance of greater coherence in the approaches taken in arbitral decisions...”³⁷ Although the mandate of the Study Group also includes MFN in trade law and other areas of international law³⁸, the Study Group has focused on MFN in the investment context.³⁹ The principal concern underpinning the work of the Study Group is the

²⁹ The ILC had first discussed the possibility of adding this topic to the work programme at its fifty-eighth session in 2006. It established a working group to consider whether the topic should be included in the long-term programme of work. On the basis of the report produced by the working group (contained in Annex B to the 2008 ILC Report), the ILC decided to include “the Most-Favoured Nation Clause” on its programme of work at the sixtieth session and to establish a Study Group at the sixty-first session; *Report of the International Law Commission Sixtieth Session (2008 Report)*, UN Document A/63/10, para. 354.

³⁰ International Law Commission, ‘Draft Articles on most-favoured nation clauses with commentaries’ (1978 II) *Ybk Int’l Law Comm’n Part Two* 16.

³¹ The UN General Assembly had adopted six resolutions from 1978 to 1988 calling for comments from states on the draft articles.

³² UN General Assembly decision 46/416 of 9 December 1991.

³³ *2008 Report*, Annex B, para. 10. See also the section on developments since 1978, paras 16-21.

³⁴ *2008 Report*, Annex B, para. 17.

³⁵ *Report of the International Law Commission Sixty-third Session (2011 Report)*, UN Document A/66/10, para. 362.

³⁶ See *2011 Report*, para. 355.

³⁷ *Report of the International Law Commission Sixty-fourth Session (ILC Report 2012)*, UN Document A/67/10, para. 246. The Report continues, “it is considered that the Study Group could make a contribution towards assuring greater certainty and stability in the field of investment law.”

³⁸ See *2012 Report*, para. 264, noting that MFN in relation to trade in services under GATS as well as the relationship between MFN, fair and equitable treatment and national treatment standards “will be kept in view as the Study Group progresses in its work.”

³⁹ Although the Study Group started its discussions with a broad discussion of MFN clause in modern treaty practice, the focus of their deliberations has since narrowed to concentrate on the investment context. At the 2011 session, the Study Group considered a working paper prepared by Donald McRae, co-chair of the Study

fact that different factors appear to have influenced tribunals in their decision-making processes. It is the so-called *Maffezini* problem that has been driving the work of the Study Group.

Maffezini was a case brought by an Argentinian investor against the Kingdom of Spain under the Spain-Argentina BIT. Spain opposed the jurisdiction of the tribunal because the claimant had not complied with Article X of the BIT, providing that disputes must be submitted to domestic courts for a period of eighteen months before an international claim could be launched. In turn, the claimant relied upon the MFN clause in the Spain-Argentina BIT to argue that it could claim the more favourable treatment granted to Chilean investors who did not have to submit their cases to national courts before they started arbitral proceedings under the Spain-Chile BIT.⁴⁰ The tribunal noted that it was necessary to interpret the MFN clause in the Spain-Argentina BIT subject to the *ejusdem generis* rule⁴¹ and it held that “notwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by the most favoured nation clause, the Tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce.”⁴²

Maffezini was the opening shot in a barrage of lawsuits that sought to circumvent or expand the procedural provisions of BITs based upon the MFN clause. Yet the tribunals charged with deciding these disputes came to divergent conclusions on whether or not MFN clauses could be used in this way. Generally, the cases are divided into those that follow the general logic and philosophy of *Maffezini* that dispute settlement provisions do fall within the scope of MFN treatment and those cases, led by *Plama v Bulgaria*⁴³, that make the opposite assumption. In reality, the picture is much more complex and tribunals have adopted multiple approaches to resolving ambiguities in MFN clauses. Indeed, the case law on this issue has become a veritable quagmire. Not only have the number of cases on this topic continued to grow, but there have also been an increasing trend in dissenting opinions being appended to arbitral awards, demonstrating the strong differences of opinion on the correct interpretation to be given to BITs.⁴⁴ There is even an example of an arbitrator changing his mind about the correct interpretation to be given to a particular treaty.⁴⁵

Group, on the “Interpretation and Application of MFN Clauses in Investment Agreements.” The following year, the Study Group considered a working paper by Mr. Forteau on the “Effect of the Mixed Nature of Investment Tribunals on the Application of MFN Clauses to Procedural Provisions” and an updated working paper by Mr. McRae on the “Interpretation of MFN Clauses by Investment Tribunals.”

⁴⁰ See *Emilio Agustin Maffezini v. Kingdom of Spain*, Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction of 25 January 2000, paras 39-40 of the decision on jurisdiction.

⁴¹ *Emilio Agustin Maffezini v. Kingdom of Spain*, para. 46.

⁴² *Emilio Agustin Maffezini v. Kingdom of Spain*, para. 54.

⁴³ *Plama Consortium v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005.

⁴⁴ See e.g. *Austrian Airlines v The Slovak Republic*, UNCITRAL Arbitration, Final Award of 9 October 2009, with a dissenting opinion from Arbitrator Brower; *Impregillo S.p.A. v Argentine Republic*, ICSID Case No. ARB/07/17, Award of 21 June 2011, with a concurring and dissenting opinion from Arbitrator Stern and a concurring and dissenting opinion from Arbitrator Brower; *Hochtief AG v Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction of 24 October 2011, with a Separate and Dissenting Opinion of Arbitrator Thomas, Q.C.; *Daimler Financial Services AG v Argentine Republic*, ICSID Case No. ARB/05/1, Award of 22 August 2012, with Dissenting Opinion of Arbitrator Brower.

⁴⁵ See *Daimler Financial Services AG v Argentine Republic*, where Arbitrator Janeiro expressed an opinion contrary to the dispositive he had voted for in *Siemens AG v Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction of 3 August 2004. For an explanation of his change of heart, see the Separate Opinion of Arbitrator Janeiro where he explains that he “participated in the latter decision, including of course the

Undoubtedly these cases in part demonstrate different “underlying [philosophies] of investment arbitration.”⁴⁶ Indeed, there are examples when the same treaty has been interpreted in diametrically opposed ways by different tribunals.⁴⁷ These cases are clearly a cause for concern. Yet, the mixed results of treaty interpretation are not to be completely unexpected in a system of *ad hoc* arbitration where different arbitrators take part in decisions on the same subject matter and they are able to give different weight to various interpretative materials. Indeed, it is striking that the arbitrators often reach different results, even though they purportedly profess to apply the same rules of treaty interpretation. This demonstrates that there is some truth to the statement that treaty interpretation is an art as much as a science.⁴⁸ Whilst the ILC may be able to make an objective critique of the reasoning of tribunals against the principles of treaty interpretation found in the Vienna Convention on the Law of Treaties, an insistence that arbitrators stick more closely to those principles does not guarantee unified results.

Perhaps more importantly, differing philosophies is not the only explanation to the diversity of results in the MFN cases. Many of the differences can also be explained by the fact that the MFN clauses in BITs often follow very different formulations. Unlike many standards found in investment treaties, MFN treatment is not a rule of customary international law. In this regard, the 1978 Draft Articles explicitly recognized that “although it is customary to speak of *the* most-favoured nation clause, there are many forms of the clause, so that any attempt to generalize upon the meaning and effect of such clauses must be made, and accepted, with caution.”⁴⁹ Rather, as noted by the Commission of Arbitration in the *Ambatielos Case*, “the question [of the interpretation of an MFN clause] can only be determined in accordance with the intentions of the Contracting Parties as deduced from a reasonable interpretation of the Treaty.”⁵⁰ Given that this is an area where there is a significant diversity of language⁵¹, it follows that there is a limit to the degree of harmonization and uniformity that one can expect concerning the interpretation of the MFN clause. This is therefore an area where assumptions about multilateralization cannot be made.

Decision on Jurisdiction, and endorsed the opinion of the other members of the tribunal specifically in order to ensure the smooth internal functioning of the tribunal.”

⁴⁶ Y. Banifatemi, ‘The Emerging Jurisprudence on the Most-Favoured Nation Treatment in Investment Arbitration’, in A.F. Bjorklund, I.A. Laird, and S. Ripinsky (eds), *Investment Treaty Law Current Issues III* (BIICL, 2009), 250.

⁴⁷ Compare *Siemens AG v Argentine Republic* and *Hochtief AG v Argentine Republic* on the one hand with *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No. ARB/04/14, Award of 8 December 2008, and *Daimler Financial Services AG v Argentine Republic* on the other hand

⁴⁸ M. Waibel, ‘International Investment Law and Treaty Interpretation’, in R. Hofman and C.J. Tams (eds), *International Investment Law and General International Law* (Nomos Publishing, 2011), 32;

⁴⁹ ILC Draft Articles on Most-Favoured Nation Clauses (1978 II) *Ybk Int’l L. Comm.* 1, 20.

⁵⁰ *Ambatielos Arbitration*, Award of 6 March 1956, Reports of International Arbitral Awards, vol. XII, p. 107.

⁵¹ United Nations Conference on Trade and Development, ‘Most-Favoured-Nation Treatment’, *UNCTAD Series on Issues in International Investment Agreements II*, 2010, 96 which refers to variations in the approaches to MFN treatment and sometimes considerable differences in the wording of the substantive protection or ISDS clauses.” Indeed, as noted by Vandevelde, “the MFN treatment provision became common in BITs only in the 1970s [and] the structure of the provision was the subject of significant variation in the early history of the provision, with some developed countries that were among the first to launch BIT programs continuing to modify their provisions significantly even into the 1990s”; K. J. Vandevelde, *Bilateral Investment Treaties: History, Policy and Interpretation* (Oxford University Press, 2010), 357.

Many investment treaty tribunals have expressly recognized the role that treaty language plays in this area. For example, in *Renta 4 v Russian Federation*, the tribunal noted the futility of trying to identify the dominant view concerning any presumption that must apply to the interpretation of a MFN clause⁵² and it stressed that “it is a matter of wording of the relevant instruments.”⁵³ It is not only treaty language that can make a difference in these cases. It was stressed by the International Tribunal for the Law of the Sea in the *MOX Plant Case* that “the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, inter alia, differences in the respective contexts, objects and purposes, subsequent practice of the parties and travaux préparatoires.”⁵⁴ The application of this logic in the investment context was confirmed by the tribunal in *AES Corp v Argentina*, when it held that “each BIT has its own identity; its very terms should consequently be carefully analyzed for determining the exact scope of consent expressed by its two Parties.”⁵⁵ The tribunal continued that, “striking similarities in the wording of many BITs often dissimulate real differences in the definition of some key concepts, as it may be the case, in particular, for the determination of “investments” or for the precise definition of rights and obligations for each party.”⁵⁶ Indeed, the recent decision in *Austrian Airlines v Slovak Republic* emphasized the importance of context in interpreting MFN clauses.⁵⁷

States have also begun to recognize that they may have to give a more precise indication of their intentions. Thus, for example, the 2009 UK-Ethiopia BIT expressly provides that its MFN clause that “except provided otherwise in this Agreement and for the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 10 of this Agreement”, thus covering investor-state dispute settlement.⁵⁸ In contrast, Article 88(2) of the Japan-Switzerland EPA provides that “it is understood that the treatment referred to in paragraph 1 does not include treatment accorded to investors of a non-Party and their investments by provisions concerning the settlement of investment disputes between a Party and the non-Party that are provided for in other international agreements.”⁵⁹ Nor is it only expressions of intent at the time of the treaty that can be taken into account. Arguably, the treaty parties have a power to interpret the

⁵² *Renta 4 S.V.S.A. v Russian Federation*, Arbitration Institute of the Stockholm Chamber of Commerce, Award on Preliminary Objections of 20 March 2009, para. 94. It continued, “What can be said with confidence is that a jurisprudence constant of general applicability is not yet firmly established. It remains necessary to proceed BIT by BIT.”

⁵³ *Renta 4 v Russian Federation*, para. 90. The tribunal continued, “this is one of the reasons awards under BITs are of variable relevance and value in subsequent cases.” The tribunal in *Maffezini* itself noted that the MFN clause that it was faced with interpreting, which applied to “all matters subject to this Agreement”, was broader than the usual formulation found in many other investment treaties concluded by Spain; *Emilio Agustín Maffezini v. Kingdom of Spain*, para. 60.

⁵⁴ *MOX Plant Case*, (Provisional Measures) Order of 3 December 2001 (2002) 41 ILM 405, para. 51.

⁵⁵ *AES Corp. v Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction of 26 April 2005, para. 24.

⁵⁶ *AES Corp. v Argentine Republic*, para. 25.

⁵⁷ *Austrian Airlines v The Slovak Republic*, para. 138. Note, however, the strong dissenting opinion of Arbitrator Brower on this point where he says (at para. 7) that “it is not appropriate to consider provisions as ‘context’ for interpreting an MFN clause that are less favourable than provisions in third-State treaties to which Claimant claims access.”

⁵⁸ UK-Ethiopia BIT, Article 3(3).

⁵⁹ See a broader range of examples in United Nations Conference on Trade and Development, ‘Most-Favoured-Nation Treatment’, 84-87.

treaty text at any time⁶⁰ and they may therefore clarify their intentions through an interpretative agreement. Thus, it is reported that “the Argentine Republic and Panama exchanged diplomatic notes with an ‘interpretative declaration’ of the MFN clause in their 1996 investment treaty to the effect that, the MFN clause does not extend to dispute resolution clauses, and that this has always been their intention.”⁶¹ The increasing appearance of interpretative decisions adopted by the parties to a treaty, which is itself compatible with the principles of treaty interpretation found in the Vienna Convention on the Law of Treaties⁶², further emphasizes the importance of recognizing the bilateral basis of treaty provisions in BITs.

The ILC Study Group does recognize the diversity of language and the need to take into account the particular intentions of the parties to a treaty. At the 2012 session, the report of the ILC stated that “whether or not an MFN provision was capable of applying to the dispute settlement provision was a matter of treaty interpretation to be answered depending on each particular treaty, which had its own specificities to be taken into account.”⁶³ Yet, if this is the case, it can be asked whether the ILC can make any useful recommendations of general application. Although the ILC may be able to assist in preparing interpretative guidance on the underlying principles that may inform the interpretation of MFN clauses⁶⁴, any general principles must be subordinate to the actual treaty text in a particular case. The logic of MFN clauses, based upon the specific intention of the parties to a particular treaty, thus suggests that any general guidance will only have a limited impact on the reasoning of tribunals.

The attitude of the Commission to MFN clauses can be contrasted with its approach to other topics that address legal regimes based upon bilateral treaty provisions. For example, when it was proposed to consider the topic of oil and gas law under the rubric of shared natural resources, the Commission decided that the fact that “transboundary oil and gas issues were essentially bilateral in nature” raised doubts about “the need for the Commission to proceed with any codification exercise on the issue, including the development of universal rules.”⁶⁵ Rather, “it was considered that the option of collecting and analyzing information about State Practice concerning transboundary oil and gas ... would not lead to a fruitful exercise for the Commission, precisely because of the specificities of each case involving oil and gas.”⁶⁶ Whilst this is a crude analogy, it can also be said that the interpretation of MFN clauses varies on a case-by-case basis depending on the intentions of the parties to a particular treaty. It follows that the usefulness of general guidance is always going to be limited.

An alternative outcome suggested by the Study Group is the development of “model MFN clauses or categories of clauses with commentaries on their interpretation.”⁶⁷ Such clause would be directed as “guidance to States in their negotiation of agreements with MFN

⁶⁰ According to Article 31(3)(a) of the Vienna Convention on the Law of Treaties, “there shall be taken into account, together with the context, any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions...”

⁶¹ *National Grid P.L.C. v Argentine Republic*, UNCITRAL Arbitration, Decision on Jurisdiction of 20 June 2006, para. 85.

⁶² See generally A. Roberts, ‘Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States’ (2010) 104 *Am. J. Int’l L.* 179; UNCTAD, ‘Interpretation of IIAs: What can States do?’, *IIA Issues Note No. 3*, December 2011.

⁶³ *Report 2012*, para. 262.

⁶⁴ *Report 2012*, para. 260.

⁶⁵ *Report of the International Law Commission Sixty-second session (Report 2010)*, UN Document A/65/10, para. 382. Other reasons were also advanced for not considering the topic.

⁶⁶ *Report 2010*, para. 383.

⁶⁷ *2008 Report*, Annex B, para. 38.

clauses.”⁶⁸ This approach certainly avoids the need to address the differences in existing treaty language by focusing on possible advice for negotiators of future instruments. Yet, it must be wondered whether the ILC is the best body to conduct this type of work. Indeed, similar exercises have been undertaken by other bodies in the past. UNCTAD has already explicitly provided policy advice to negotiators and policy-makers.⁶⁹ Particularly notable in this context is the UNCTAD report on MFN Treatment, updated in 2010, which precisely aims to provide policy advice and guidance to states seeking to negotiate investment treaties.⁷⁰ The report generally advises states to “be aware that, as for any other provision of the investment treaty, wording matters and the formulation resulting from the negotiation should make the intention of the parties clear and unambiguous”⁷¹, as well as setting forth model language that can be used by negotiators to achieve this end. Any effort by the ILC to develop model clauses would therefore appear to be duplicating activity that is taking place in other forums.

On this basis, it is suggested that the question of the interpretation of MFN clauses offers limited opportunities for the ILC to make a valuable contribution to the coherent development of international investment law. However, this conclusion does not mean that the ILC has no potential role in this area of international law. There are other aspects of international investment law where it is suggested the ILC could make a greater contribution.

5. Customary International Investment Law

The so-called “treatification” of international investment law⁷² has not lead to the complete replacement of other sources of international law in this area. In particular, most authors agree that customary international law remains highly relevant in relation to many aspects of international investment law.⁷³ As claimed by Gazzini, “customary rules constantly and intensely interact with bilateral and multilateral rules.”⁷⁴ There are two principal ways in which customary international law interact with investment treaties.

⁶⁸ 2008 Report, Annex B, para. 38.

⁶⁹ United Nations Conference on Trade and Development, ‘Most-Favoured-Nation Treatment’, 102-116.

⁷⁰ Thus, the report provides that “it is ... important to take stock of the way treaty practice has evolved and to what extent States have reacted to the debate on MFN treatment [in order to] allow states to make better-informed decisions for drafting and negotiating purposes ...” United Nations Conference on Trade and Development, ‘Most-Favoured-Nation Treatment’, 4.

⁷¹ United Nations Conference on Trade and Development, ‘Most-Favoured-Nation Treatment’, 87.

⁷² J. W. Salacuse, ‘The Treatification of International Investment Law’ (2007) 13 *Law & Bus. Rev. Am.* 155.

⁷³ Some authors also argue for a greater role for general principles of law; see e.g. S.W. Schill, ‘Enhancing International Investment Law’s Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach’ (2011) 52 *V. J. Int’l L.* 57. Tribunals have also recognized the potential role of general principles identified through a comparative analysis. Thus, one tribunal noted that “the fair and equitable treatment standard of international law does not depend on the perception of the frustrated investor, but should use public international law and comparative domestic public law as a benchmark”; *Toto Construzioni Generali S.P.A. v Lebanon*, ICSID Case No. ARB/07/12, Award of 7 June 2012, at para. 166. Whilst recognizing the potential role of general principles, this paper concentrates on the underpinning role of customary international law because it is this source of law that is most explicitly recognized in investment treaties and there are also many examples from the case law where tribunals have attempted to apply customary international law to support their interpretation of a treaty.

⁷⁴ T. Gazzini, ‘The Role of Customary International Law in the Field of Foreign Investment Law’ (2007) 8 *J. World Investment & Trade* 691, 691. See also J. Alvarez, ‘A BIT on Custom’ (2009) 42 *N.Y.U. J. Int’l L. & Pol.* 17, 31: “There are many provisions in [investment] treaties that explicitly or implicitly rely on general international law or reflect an intent by their drafters to affirm traditional principles of state responsibility to aliens.”

Firstly, there are many provisions in investment treaties that explicitly refer to rules of customary international law. Indeed, the inclusion of such provisions would appear to be increasing. For example the Korea-US FTA provides in Article 11.5(1) that “Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.” It continues, “For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.”⁷⁵

It is not only in relation to the minimum standard of treatment that customary international law has been expressly relied upon. Annex 10-C of the CAFTA-DR provides that its rule on expropriation in Article 10.7.1 “is intended to reflect customary international law concerning the obligation of States with respect to expropriation.” The CAFTA-DR also makes a reference to customary international law in Article 10.6(2) which requires restitution or compensation “in accordance with customary international law” where the property of an investor has been requisitioned or unnecessarily destroyed by the armed forces of a party during armed conflict or times of strife.

Even in the absence of an express reference, customary international law may also be relevant to the interpretation and application of a treaty on the basis of Article 31(3)(c) of the Vienna Convention, which requires a treaty interpreter to “take into account ... relevant applicable rules of international law.” Given that customary international law is by its very nature applicable to all states⁷⁶, there is little doubt that these rules provide part of the wider context of an investment treaty for the purpose of the Vienna Convention.⁷⁷ As noted by McLachlan, “the central concepts in investment treaties are mobile, in the sense that, by using the generally adopted terms, the parties’ intention is to submit to the evolving meaning in international law, and not to confine themselves to their own idiosyncratic definition, fixed at the time of conclusion of the treaty.”⁷⁸ In this sense, many standards in investment treaties, despite being contained in a bilateral agreement, may nevertheless draw upon multilateral rules based upon other sources of law. As a result of this interaction, it is possible to talk about common standards that are applicable to many states.⁷⁹

⁷⁵ Korea-US FTA, Article 11.6. See also US-Singapore FTA, Article 15.5; CAFTA-DR, Article 10.5; UK-Mexico BIT, Article 3.

⁷⁶ Unless they are a persistent objector.

⁷⁷ See e.g. J.W. Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2010), 150-152, although noting that “the application of the Vienna Convention’s Article 31(3)(c) to the interpretation of international investment treaties requires a careful and balanced approach in order to avoid unjustifiably including the same rules of international customary law that the contracting states sought to avoid by making a treaty.” See also M. Paparinskis, ‘Investment Treaty Interpretation and Customary Investment Law: Preliminary Remarks’, in C. Brown and K. Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011), discussing inter alia when customary international law is “relevant” for the purpose of interpreting investment treaties.

⁷⁸ McLachlan, ‘International Treaties and General International Law’, 374.

⁷⁹ See S. W. Schill, ‘From Sources to Discourse: Investment Treaty Jurisprudence as the New Custom?’, paper presented at 16th Investment Treaty Forum Public Conference on “Is There an Evolving Customary International Law on Investment?”, British Institute of International and Comparative Law, London, 6 May 2011, 16: “the move ... to create a multilateral legal order for international investment relations will only be legitimate and accepted by States if it remains linked to one of the traditional sources of multilateral order under international law, that is either a multilateral treaty, customary international law, or general principles of law.”

Even if it is undeniable that customary international law is still relevant to investment protection, the task of identifying customary international law for the protection of foreign investment is not straightforward. It is well-known that customary international law requires evidence of general practice accepted as law.⁸⁰ Thus, it is often said that custom is made up of two components – state practice and *opinio juris*. These two components are intrinsically linked and the International Court of Justice (ICJ) has stressed that “not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of [customary] law requiring it.”⁸¹ There is clear evidence that this traditional understanding of customary international law is still supported by states. For example, several treaties concluded by the US with other states explicitly confirm that customary international law “results from a general and consistent practice of States that they follow from a sense of legal obligation.”⁸²

Proving the existence of customary international law is essentially a question of fact.⁸³ Yet, this is often a difficult task, particularly in the context of litigation. The focus of the exercise is not on what the two parties to the case think, but on the identification of evidence of “extensive and virtually uniform”⁸⁴ practice which is representative of the international community as a whole. As noted by the ICJ in the *Nicaragua* case:

“The Court notes that there is in fact evidence ... of a considerable degree of agreement between the Parties as to the content of customary international law relating to the non-use of force and non-intervention. This concurrence of views does not however dispense the Court from having itself to ascertain what rules of customary international law are applicable. The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States. Bound as it is by Article 38 of its Statute to apply, *inter alia*, international custom “as evidence of general practice accepted as law”, the Court may not disregard the essential role played by *general* practice.”⁸⁵

Courts and tribunals have always struggled to fully apply the rules on the formation of customary international law in a clear and convincing manner. Thus, one commentator noted that the International Court of Justice has made decisions about the existence of customary international law “without embarking upon any empirical research as to whether the respective rules were recognized as law and reflected in State practice.”⁸⁶ The challenge is made even more difficult by that fact that custom is by its very nature evolutionary, so that it

⁸⁰ ICJ Statute, Article 38(1).

⁸¹ *North Sea Continental Shelf Case*, at para. 77. Thus, in *North Sea Continental Shelf Case*, the ICJ dismissed practice which could not be shown to be caused by a belief that there was a rule of customary international law. See ILA.

⁸² CAFTA-DR, Annex 10-B; see also exchange of letters between the US and Singapore, available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file665_4057.pdf. The ILC has itself just started a study on the formation and evidence of customary international law; see 2012 Report, ch. VIII.

⁸³ *Glamis Gold Ltd. v United States of America*, UNCITRAL Arbitration, Award of 8 June 2009, para. 607: “Ascertaining custom is necessarily a factual inquiry, looking to the actions of States and the motives for and consistency of these actions.”

⁸⁴ *North Sea Continental Shelf Cases* (1969) ICJ Reports 3, para. 73.

⁸⁵ *Nicaragua Case* (1986) ICJ Reports 14, para. 184. (emphasis added)

⁸⁶ R. Wolfrum, ‘The Legal Order for the Seas and Oceans’, in M. Nordquist and J. Moore (eds), *Entry into Force of the Law of the Sea Convention* (Kluwer Law International, 1995), 175. In this particular instance, he was talking about the decision in the *Continental Shelf Case* between Libya and Malta.

changes in accordance with trends of state practice and *opinio juris*. Indeed, the tribunal in *Glamis Gold* noted that “although an examination of custom is indeed necessary to determine the scope and bounds of current customary international law, this requirement, because of the difficulty in proving a change in custom, effectively freezes the protections provided for in this provision...”⁸⁷

A general assessment of state practice and *opinio juris* is often missing from decisions of tribunals. Surveying decisions rendered by ICSID tribunals between 1 January 1998 and 31 December 2006, Fauchald concludes that “no tribunal made its own assessment of whether a rule of customary international law existed, and only exceptionally did tribunals explicitly address questions concerning *opinio juris*.”⁸⁸ Whilst one cannot expect tribunals to perform this task perfectly, there is a need for some evidence of the existence and scope of the rules that are being applied. Failure to do so undermines the legitimacy of their decision-making and their drive to ascertain common standards that apply across the boundaries of bilateral treaties. Yet, it is precisely in this area of weakness for tribunals that other bodies may step in to contribute to the development of international investment law.

6. Towards the Codification of Customary International Investment Law?

As noted above, the codification of customary international law is one of the core tasks of the ILC.⁸⁹ Therefore, it is suggested that the Commission is in a prime position to make a significant contribution to identifying the scope and content of customary international law relating to the protection of investors.

It could of course be objected that the ILC has tried to undertake this task before, but it was defeated by political deadlock. Yet, it is questionable whether such political deadlock continues to exist today. One of the major developments since the last time the Commission addressed this topic has been, as noted above, the conclusion of more than 2,500 investment treaties by states across the world. Such treaties are not only concluded between developed countries and developing countries, but also between developing countries. If anything, these treaties suggest that the political controversy concerning the treatment of aliens under international law has diminished.⁹⁰ Even if it hasn't, it is necessary to know what the rules of customary international law say on this topic because treaties concluded by particular sets of states now expressly refer to them. The ILC could make a substantial contribution to this question by identifying relevant state practice and *opinio juris*. Not only can it assist tribunals in identifying relevant material evidence of customary international law, the ILC can also, in accordance with the understanding of codification discussed above, suggest how to fill gaps in a manner that may contribute to the development of law in this area.

⁸⁷ *Glamis Gold Ltd. v United States of America*, para. 604.

⁸⁸ O.K. Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis' (2008) 19 *E. J. Int'l L.* 301, 311. See also at 349: “few ICSID tribunals made any extensive assessment of generalized state practice.” He concludes (at 313) that “ICSID tribunals in general have a significant potential to improve their reasoning relative to customary international law and general principles of law.”

⁸⁹ ILC Statute, Article 1(1).

⁹⁰ In 1998, an independent Study Group on the Future Work of the International Law Commission concluded that “although the customary status of some of the rules [relating to the taking of property by states] remains controversial, the prospects for reaching agreement look more promising now than at any time in the past”; M.R. Anderson, A.E. Boyle, A.V. Lowe, and C. Wickremasinghe (eds), *The International Law Commission and the Future of International Law* (BIICL, 1998), 40. It therefore recommended the issue as a topic for exploration.

Of course, the influence of the work of the ILC will depend on the reaction of states to its suggestions.⁹¹ The advantage of the Commission taking on this task, as opposed to private bodies or other intergovernmental institutions, is its place within the UN system. The ILC does not work alone in the codification process. The ILC Statute explicitly requires consultation between the Commission and individual Governments on the one hand⁹², and with the UN General Assembly on the other hand.⁹³ In practice, the ILC maintains a regular dialogue with the Sixth Committee of the UN General Assembly, as well as with other intergovernmental bodies with an interest in codification of international law. These are important provisions, as the imprimatur of governments is often key to successful codification.⁹⁴ Moreover, the interactions of governments in the codification process can itself contribute to the so-called crystallization of customary international law. The crystallization of customary international law relating to the continental shelf was explained in the *North Sea Continental Shelf Cases* as “the process of the definition and consolidation of the emerging customary law [that] took place through the work of the International Law Commission, the reaction of governments to that work and the proceedings of the Geneva Conference ...”⁹⁵ This potential for interaction thus offers enormous opportunities for the development of customary international law through the work of the International Law Commission.

There are people who believe that trying to identify substantive rules of customary international law in the field of investment protection is a fool’s errand. For example, D’Aspremont argues that many of the standards which it is claimed have crystallized in customary international law are “highly imprecise and vague”⁹⁶, and he highlights the international minimum standard of treatment as a prime example. If true, this critique arguably holds true of many rules found in investment treaties as well. Moreover, it ignores the view that states clearly accept that such rules do exist as a matter of customary international law. Yet, what this critique does usefully highlight is that we may not be seeking specific rules of conduct that guide states in particular situations, but rather general principles which provide an international benchmark for state behaviour in relation to foreign investors.⁹⁷

⁹¹ Boyle and Chinkin, *The Making of International Law*, 179: “its work can only be successful if it is politically acceptable.” See also Ian Sinclair, *The International Law Commission* (Grotius Publications, 1987), 125: “a codification convention that does not enjoy the support or approval of a significant group of States whose assent is necessary to the effective implementation of the convention is hardly likely to be regarded as being expressive of existing international law or as generating new law.”

⁹² ILC Statute, Article 19(2) provides that “the Commission shall, through the Secretary-General, address to Governments a detailed request to furnish the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the topic being studied and which the Commission deems necessary.” See also Article 21(2) which requires the Commission to submit a final draft of any proposed codification to governments for comment before formally submitting them with recommendations to the General Assembly.

⁹³ ILC Statute, Article 20.

⁹⁴ See above.

⁹⁵ *North Sea Continental Shelf Cases*, para. 61. See also Counter-Memorial of the Netherlands, *North Sea Continental Shelf Cases*, ICJ Pleadings, 1968, vol. 1, 336–337.

⁹⁶ d’Aspremont, ‘International Customary Investment Law: The Story of a Paradox’, 33.

⁹⁷ Indeed, it is noteworthy that several recent instruments talk of general principles of customary international law. See e.g. Korea-US FTA, Annex 11-A: “the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.”

It must be admitted that there may be certain other challenges to the codification of customary international investment law. The proliferation of investment treaties itself potentially pose additional problems for codification. In this regard, McLachlan comments that “the overwhelming majority of State practice in this field in the last few decades has been through the medium of treaty-making, starving custom of independent progressive development.”⁹⁸ Thus, he concludes that “an application of the classic test for the formation of a rule of custom in this area would have little meaning, given the paucity of any State practice outside the treaties’ reach.”⁹⁹ Whilst it is true that there are many investment treaties, it must be wondered whether there is really a lack of practice independent of treaties. Firstly, as noted above, several treaties expressly refer to customary international law and therefore practice in relation to those provisions will necessarily relate to the formulation of customary rules. For example, states have expressly considered the content of customary international law in their pleadings in litigation and this evidence has sometimes been taken into account by tribunals.¹⁰⁰ Secondly, there are still many inter-state relationships which are not governed by such treaties.¹⁰¹ Indeed, the importance of a codification exercise is that it gather and evaluates all potential evidence of state practice and *opinio juris* before it comes to conclusions about the existence of certain rules of customary international law.

Some authors would also argue that the thousands of BITs have themselves contributed to the development of customary international law, muddying the waters between treaty and custom.¹⁰² This argument appears to have received a positive reception in *Mondev v United States* where the tribunal noted that “such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law.”¹⁰³ Of course, it begs the question whether this practice is accompanied by the requisite *opinio juris*.¹⁰⁴ Regardless of the answer to this question, there is clearly a serious question that needs addressing and the Commission could play a valuable role in this process. One of the key challenges for codification in this area is to disentangle treaty law from customary international law in order to know when we can talk about universal rules and principles and when we should concentrate on identifying the intentions of the particular parties to a treaty.

⁹⁸ McLachlan, ‘International Treaties and General International Law’, 365.

⁹⁹ McLachlan, ‘International Treaties and General International Law’, 394.

¹⁰⁰ See e.g. *Glamis Gold Ltd. v United States of America*, UNCITRAL Arbitration, Award of 8 June 2009, para. 603: “the evidence of such ‘concordant practice’ undertaken out of a sense of legal obligation is exhibited in very few authoritative sources: treaty ratification language, statements of governments, treaty practice (e.g., Model BITs), and sometimes pleadings.”

¹⁰¹ Gazzini estimated in 2007 that “BITs cover only about 13% of the bilateral relationships between the States composing the international community”; Gazzini, ‘The Role of Customary International Law in the Field of Foreign Investment’, 691.

¹⁰² A.F. Lowenfeld, ‘Investment Agreements and International Law’ (2003-2004) 42 *Colum. J. Transnat’l L.* 123; S.M. Schwebel, ‘The Influence of Bilateral Investment Treaties on Customary International Law (2004) 98 *Am. Soc’y Int’l L. Proc.* 27; Alvarez, ‘A BIT on Custom’; I. Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford University Press, 2008), 53-54. See also the more skeptical views of P. Dumberry, ‘Are BITs Representing the “New” Customary International Law in International Investment Law?’ (2010) 28 *Penn State Int’l L. Rev.* 675.

¹⁰³ *Mondev International v United States of America*, Case No. ARB (AF)/99/2, Award of 11 October 2002, para. 125.

¹⁰⁴ See J. d’Aspremont, ‘Internatoinal Customary Law: The Story of a Paradox’, in E de Brabandere and T. Gazzini (eds), *Sources of Transnational Investment Law* (Martinus Nijhoff, 2012), 35 who claims that “conflations between practice and *opinio juris* further weaken the theory of customary investment law.”

7. Tentative Steps towards the Codification of International Investment Law?

Based upon the arguments developed above, this final section of the paper is intended to identify those areas of international investment law that may be “ripe” for codification by the ILC. It is suggested that there are several aspects of international investment law, for which clarification and elucidation of customary international law could be helpful, including rules and principles relating to expropriation, fair and equitable treatment, denial of justice, and constant protection and security. In many instances, these are standards that investment treaty tribunals are already trying to interpret according to a multilateral logic, an exercise that would itself benefit from a basis in the evidence of state practice and *opinio juris*.

All of these areas also arguably meet the ILC’s own criteria for the selection of topics, notably that:

- (a) the topic should reflect the needs of states in respect of the progressive development and codification of customary international law;
- (b) the topic should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification;
- (c) the topic is concrete and feasible for progressive development and codification.¹⁰⁵

In particular, given the fact that tribunals are increasingly faced with having to identify and apply rules of customary international law in relation to the protection of foreign investors, there would appear to be a need for action on this point. Moreover, despite many statements about the evolution of customary international law¹⁰⁶, particularly in relation to the minimum standard of treatment, there has little substantive and comprehensive analysis of state practice and *opinio juris* in this area.

It would appear that the Commission may have already recognized the significance of this issue. In 2011, the subject of “fair and equitable treatment” was inscribed onto the long-term workplan of the ILC.¹⁰⁷ References to fair and equitable treatment are found in the vast majority of BITs and it is perhaps “the most frequently pleaded obligation in international investment arbitration.”¹⁰⁸ There is of course intense controversy about the precise meaning of this term. The concept paper prepared for the Commission identifies a number of questions relating to the standard, including:¹⁰⁹

- Is fair and equitable treatment synonymous with the international minimum standard?
- Does the fair and equitable treatment standard now represent customary international law?
- Is fair and equitable treatment a principle of international law?

¹⁰⁵ See *Report of the International Law Commission Fiftieth Session (1998 Report)*, UN Document A/53/10, para. 553.

¹⁰⁶ *Mondev International v United States of America*, para. 116.

¹⁰⁷ *2011 Report*, para. 365.

¹⁰⁸ M. Kinnear, ‘The Continuing Development of the Fair and Equitable Treatment Standard’, in A.K. Bjorklund, I.A. Laird, and S. Ripinsky (eds), *Investment Treaty Law Current Issues III* (BIICL, 2009), 209.

¹⁰⁹ *2011 Report*, Annex D.

It is apparent that the concept paper raises a wide range of questions concerning fair and equitable treatment, including both treaty law and customary law aspects of the problem. It is suggested that, in light of the foregoing arguments, the questions relating to customary international law would be particularly suitable for study by the ILC. It is in this respect that the Commission can draw on its strengths and it can make the greatest contribution to promoting coherence in the development of international investment law by giving a more precise formulation and legal basis for the application of the minimum standards of treatment under customary international law.

8. Conclusion

International investment law is already on the agenda of the ILC and it looks likely to stay there as additional topics are taken on by the Commission. This raises questions about precisely which aspects of the subject should be considered by the ILC. It has been argued in this paper that there is a considerable difference between those standards of investment law which are based solely on treaty law and those standards which owe some of their existence to broader rules and principles of customary international law. To date, the Commission has concentrated its efforts on demystifying the MFN clause, which belongs in the former category. Yet, the diversity of language of MFN clauses and the fact that such provisions rest solely upon a treaty basis means that it is difficult to draw generalizable conclusions in this area. Moreover, there is already a growing body of scholarly analysis and policy advice so that any future recommendations of the ILC are in danger of being lost in the crowd. Similar observations could be made about other controversial standards in investment jurisprudence, such as umbrella clauses or procedural conditions attached to dispute settlement.

In contrast, the controversies and uncertainties surrounding the current status of customary rules for the protection of foreign investment would seem to be an area in which the Commission, embedded as it is within the intergovernmental structures of the UN, would be in a prime, if not unique, position to address. The continuing importance of customary international law to the protection of foreign investment, particularly when it is expressly incorporated into treaties, means that this is an area where the ILC could make a real difference by drawing upon its expertise in the codification of international law. If successful, the results of the codification process are likely to be highly persuasive and they will give more legitimacy to centralizing trends evident in the decisions of investment tribunals. Thus, where there are standards of investment protection found in customary international law, the elaboration of draft articles by the Commission, in close consultation with the international community, could help to provide a firm foundation for the coherent development of these aspects of international investment law. It follows that the enterprise of codifying rules of customary international law would appear to offer the Commission greater opportunities to achieve to its stated aim to “safeguard against fragmentation of international law and to stress the importance of greater coherence in the approaches taken in the arbitral decisions in the area of investment.”¹¹⁰

¹¹⁰ 2012 Report, para. 246.